

Patents of Interest of National Defense – A Brazilian and French Perspective

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Article 75 of the Industrial Property Law (Law 9,279/96) guarantees the State the right to intervene in the processing of patent applications and/or in the exploitation of patents that involve inventions that may affect National Security, provided that such requests have been deposited primarily in Brazil. Inventions in the area of the arms or nuclear industry, among others, can be cited as examples of cases that can be included in this device.

Such a definition gives rise to different interpretations, especially when inserted in the scope of commercial contracts. According to Prof. Alexandre Aragão, they only reflect the binding norms of Brazilian law, which cannot be removed by the will of the parties, without creating new rights of an exclusively contractual nature in favor of the government or any of its bodies, such as the Brazilian Air Force. In other words, the granting of industrial property rights and the granting of such patents, that is, the waiver or other contractual arrangement avoiding the restriction on the use of state industrial property, could only be contemplated, to the extent that Brazilian law, including the rules of public policy in terms of Brazilian national defense, would allow.

Thus, it would suffice to rely on Brazilian law to determine the scope of confidential restrictions on contracts involving patents or technology of nation interest. However, article 75 of Law 9,729/96 on Industrial Property only provides that "The patent application originating in Brazil whose object is of interest to the national defense will be processed in a confidential manner and will not be subject to the publications provided for in this Law." and that "the INPI will immediately forward the request to the competent body of the Executive Branch for, within a period of 60 (sixty) days, to express an opinion on the confidential nature. After the deadline without the manifestation of the competent body, the request will be processed normally".

Note that it is not stipulated which would be the "competent body of the Executive Power" responsible for judging the origin of the request for secrecy made by the INPI, as occurred in the Industrial Property Code of 1971, in which the Secretary of Security was specifically mentioned. and the General Staff of the Armed Forces as bodies responsible for such analysis. Therefore, the Executive Power reserves the right to designate or establish such a body.

The Secretariat for Strategic Affairs of the Presidency of the Republic was then designated by Decree no. 2,553, of April 16, 1998, as competent to analyze cases of national defense interest. In practice, the Secretariat sent representatives on a monthly basis to the INPI who analyzed all patent applications of national origin and isolated those that were considered to be of national defense interest, in order to analyze them in more depth.

With the extinction of the aforementioned Secretariat by means of a provisional measure in 1999, and also, given the lack of another body to

replace it, there was, for a certain period, a large accumulation of patent applications awaiting analysis, which resulted in the delay of its processing at the INPI. To temporarily solve this problem, the analysis step was eliminated, until a new body was appointed to replace the extinct Secretariat. What happens is that, currently, no analysis of patent applications is carried out in relation to the provisions of this article.

As a result, the simple inclusion of an article in the Brazilian Industrial Property Law does not respond to the needs of an Intellectual Property system operating in the area of national defense, as there are questions about the way in which the integration between the governmental bodies responsible for this matter is carried out, which the criteria taken into account for a patent or technology application to be placed in this context and which bodies would be responsible for determining what is or is not of national strategic interest.

Therefore, given the procedural gaps in article 75 of the LPI, it seems appropriate to make comparisons between Brazil and France, a signatory country of the Lol (Letter of Intention signed on July 6, 1998, transformed into the Framework Agreement concerning measures to Facilitate the Restructuring and Operation of the European Defense Industry, of 27 July 2000), and which, together with the other signatory countries of the agreement, represents 90% of the production of defense equipment in the European Union.

1. Scope of the notion of "National Defense"

Defense agencies have always been interested in innovation, constantly seeking to provide their armies with the best possible means of defense and attack, means that must be superior to those of the adversary.

In this race, the assumed leadership in a technical field can be critical. An innovation cannot, therefore, be made public if it allows the military to achieve operational superiority, whether defensive or offensive. Therefore, in most countries of the world, the legislator gave defense agencies some means, such as:

(a) Possibility of knowledge of innovations that are the subject of a patent, that is, that will probably be made public through the publication of the respective application.

(b) Prohibition of disclosure of the most sensitive requests, giving them a level of strategic confidentiality.

In France, the Ministry of Defense aims to "guarantee the security and integrity of the territory and the lives of the population at all times, in all circumstances and against all forms of aggression. All public policies contribute to national security." (C. Defense, art. L1111-1). Defense is, therefore, incorporated into a global concept that associates military defense with a civil and economic dimension, as well as a social and cultural dimension.

The same occurs in Brazil, where the National Defense Policy defines national defense objectives as being (i) guaranteeing sovereignty, national heritage, and territorial integrity; (ii) to defend national interests and Brazilian people,

property and resources abroad; (iii) contribute to the preservation of cohesion and national unity; (iv) contribute to regional stability; (v) contribute to the maintenance of international peace and security.

Thus, whether in Brazil or abroad, the scope of the notion of "national defense", being sufficiently comprehensive, encompasses the most diverse technologies, whether they involve war material or not. As an example, some Petrobras patents dealing with pyrobituminous shale retort technologies were processed as being of National Security.

2. The confidential nature or not of the patent application

Once the patent application has been filed, its holder, who benefits from a priority date, may wish to disclose it quickly (conference, early publication, commercial exploitation, etc.). However, the examination of the patent application by the defense authorities and the possible decision to classify it as confidential does not occur, for obvious reasons, immediately after the application is filed. Therefore, it is necessary to provide for the application to remain secret for a certain period, regardless of whether the application is national or PCT, since the applicant seeks to eventually patent an invention of interest to the National Defense, the disclosure of which may be inopportune.

The duration of this "initial secrecy" period should be limited so as not to overly penalize the applicant, who remains uncertain as to the possibility of publishing his application and obtaining the patent. Defense authorities therefore have a maximum period to make their decision, which varies from country to country.

In Brazil, if there were a body responsible for this analysis, it would have, as provided for in article 75 of the LPI, a period of 60 (sixty) days to issue its decision. However, article 30 of the same law provides that:

"The patent application will be kept confidential for 18 (eighteen) months from the filing date or the oldest priority, when there is, after which it will be published, the exception provided for in article 75".

It is possible to request the anticipation of the notice of publication, if it is not in the interest of national defense.

As for the French system, article L. 612-8 of the Intellectual Property Code provides that "The Minister of Defense is authorized to take cognizance of patent applications at the National Institute of Industrial Property on a confidential basis." and article L.612-9 orders that:

"Inventions that are the subject of patent applications cannot be freely disclosed and worked on until an authorization has been granted for that purpose.

During this period, patent applications may not be made public, no authenticated copy of the patent application may be issued without authorization and the procedures provided for in articles L.612-14, L.612-15 and 1 of article L. 612-21 cannot be started.

With the exception of article L.612-10, the authorization provided for in the first paragraph of this article may be granted at any time. It can be acquired automatically at the end of a period of 5 (five) months from the filing date of the patent application.

The authorizations provided for in the first and second paragraphs of this article will be granted by the Director of the National Institute of Industrial Property under the opinion of the Minister of Defense".

Thus, both in France and in Brazil, whether the application is of national interest or not, a period of "initial confidentiality" is foreseen, during which all patent applications must be kept confidential. This period is a maximum of 5 months in France and 18 months in Brazil. Once the period of secrecy has ended and there has been no manifestation to the contrary by the defense bodies, the publication of the request will occur automatically.

3. The process and criteria for determining confidentiality

In Brazil, Decree no. 2,553, of April 16, 1998, details the process and criteria for determining whether or not a patent application is confidential. In its first article it is stated that:

"The [defunct] Secretariat for Strategic Affairs of the Presidency of the Republic is the competent body of the Executive Branch to express itself, on its own initiative or at the request of the National Institute of Industrial Property - INPI, on the confidential nature of patent application processes. originating in Brazil, whose object is of interest to national defense.

§1 The confidential nature of the patent application, whose object is of a military nature, will be decided based on a conclusive opinion issued by the General Staff of the Armed Forces, and the technical examination may be delegated to the Military Ministries.

§2 The confidential nature of the patent application of interest to national defense, whose object is of a civil nature, will be decided, when applicable, based on a conclusive opinion of the Ministries to which the matter is affected."

It is observed that, in general, the different countries do not disclose the criteria that lead them to decide whether or not a patent application should be processed in secrecy. This is mainly because of the evolving nature of these criteria, as a field of technology can be potentially sensitive, for example, because of its new applications, but also because a list of defense-sensitive issues is itself a confidential information.

This process takes place in a similar way in France, where article R.612-26 provides that:

"Representatives of the Minister of Defense, specially qualified for this purpose and whose names and capacities have been brought to the attention of the Director of the National Institute of Industrial Property and the Minister responsible for industrial property, will inspect patent applications at the premises of the National Institute of Industrial Property. deposited, including when they are deposited in the form of a provisional

application, and, if applicable, any supplementary documents presented, while the authorization provided for in article L.612-9 is not obtained".

It is observed that, in general, the different countries do not disclose the criteria that lead them to decide whether or not a patent application should be processed in secrecy. This is mainly because of the evolving nature of these criteria, as a field of technology can be potentially sensitive, for example, because of its new applications, but also because a list of defense-sensitive issues is itself a confidential information.

As for the process of determining confidentiality, in France, representatives of the Ministry of Defense take cognizance of all applications that are filed with the French Patent Office, and the decision to classify them as confidential rests entirely with the defense authorities. All requests are, therefore, subject to analysis by the Army, as well as to the opinion and authorization of the Ministry of Defense so that they can be made public. In the Brazilian system, however, it is not clear whether or not the defense authorities are aware of all patent applications filed with the INPI, since this analysis, when carried out, appears to be punctual ("at the request of the INPI or the initiative of the [defunct] Secretariat for Strategic Affairs of the Presidency of the Republic").

4. Consequences arising from the confidential nature of the Patent Applications

Naturally, a patent application whose decision of the competent body aims to determine total or partial secrecy is subject to restrictions, such as the prohibition of its disclosure and free exploitation by the holder, the non-publication of the application by the Patent Office and the prohibition of its submission to an international body such as WIPO, as the PCT (Art. 27(8)) fully recognizes these prerogatives of Member States.

However, in France, the terms "cannot be freely disclosed and worked on" contained in article L.612-9 of the Intellectual Property Code clearly show that exploitation, if not free, continues to be possible with the authorization of the Ministry of Defense.

In Brazil, article 75 §3. of the Industrial Property Law provides that "The exploitation and assignment of the application or patent of interest to national defense are subject to prior authorization from the competent body, with compensation being ensured whenever there is a restriction of the rights of the applicant or holder". Thus, it can be seen that, in addition to the possible exploitation and assignment of the application or patent through authorization, the applicant or holder of the patent application that has suffered restrictions may also obtain compensation. This is not the case in France, where this prerogative for the depositor or holder is not provided for.

Finally, as for sanctions in case of disrespect for the provisions mentioned here, Prof. Denis Borges Barbosa's comment seems appropriate when he describes the situation in Brazil saying that "not having provided for sanctions for those who disrespect the provision makes its effectiveness dependent on the legislation criminal". However, Brazilian Criminal Law has not yet appropriated the matter.

The same cannot be said of French criminal law, where article 411-6 of the

Penal Code provides for a penalty of 15 years in prison and a fine of up to 225,000€ if the disclosure of the request violates the fundamental interests of the nation.

However, the French system also provides for a fine of up to 6,000€ (art. L.612-13 of the CPI) in case of non-respect of the "initial secrecy", provided for in article L.612-9, regardless of any damage to National Defense. And, in case of damage to the National Defense, a prison sentence of one to five years may be applied.

All these sanctions thus testify to a greater evolution and protection of the matter in French law.

5. Conclusion

In this way, patent applications and licenses subject to private contracts, which can be classified as being of interest for National Defense, whether in Brazil or France, are mandatorily subject to confidentiality, due to normative force of public order and social interest. Thus, it is the understanding of the governments of Brazil and France that their respective defense bodies have the duty to restrict the dissemination of strategic information, even if these have been developed in cooperation with the private sector.

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